United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7600

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,

Plaintiff-Appellant,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS, et al.,

Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ISSUES PRESENTED

I. The primary issue in this case is whether the method by which ASCAP and BMI license their respective pools of copyrighted musical compositions to the television networks under a blanket license constitutes an unreasonable restraint of trade under Section 1 of the Sherman Act.

Subsidiary issues are:

II. Whether the record is adequate to make this determination.

III. If the record is inadequate, what should be the disposition of the case.

IV. If the current blanket license is found on this record to be unlawful as to the television networks, whether the license necessarily is unlawful as to other licensees of non-dramatic musical performance rights.

V. If the current blanket license is unlawful, whether it would be equally unlawful for ASCAP and BMI to license individual compositions based on prices determined by the copyright owners.

STATEMENT

Background

ASCAP is an unincorporated membership association comprising some 22,000 authors and publishers who own copyrights in musical compositions. CBS v. ASCAP, 400 F. Supp. 737, 742 (S.D.N.Y. 1975). It was formed as a clearinghouse in 1914 to solve existing problems in the licensing of rights to perform, for profit, musical works. Id. at 741. For its members, it secures payment for their copyrights and detects unauthorized uses of copyrighted music; for users, it makes licensing and indemnification against infringement readily available. Members grant to ASCAP the non-exclusive right to license their works. ASCAP, in turn, issues to users a "blanket" 1/ license to its entire repertory, which includes more than three million compositions. Id. at 742.

1/ The term "blanket" license contemplates the right to use any or all compositions in the repertory, as often as desired, for the term of the license. 400 F. Supp. at 742.

BMI was organized in 1939 by radio broadcasters, and it remains broadcaster-owned. It is affiliated with some 10,000 publishers and 20,000 writers whose musical works are licensed by BMI through blanket licenses similar to ASCAP's. BMI's repertory includes about one million works. Virtually every domestic copyrighted musical compostion is in the repertory of either ASCAP or BMI. Ibid.

The licensing activities of ASCAP and BMI are regulated by consent decrees. 2/ Under the terms of consent decrees entered in United States v. ASCAP, 1950-1951 CCH Trade Cas. ¶ 62,595 (S.D.N.Y. 1950), ASCAP is required to "grant to any user making written application therefor a nonexclusive license to perform all of the compositions in the ASCAP repertory" (Para. VI). Members retain the right to license their works individually as well (Para. IV(B)). The decree forbids ASCAP from granting "to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member * * * shall have requested ASCAP in writing so to do * * *" or the copyright owner cannot be located within 30 days (Para. VI).

2/ The United States recognizes that these decrees do not insulate ASCAP and BMI from antitrust challenges. The decrees are not material to the antitrust analysis of the blanket licenses. Indeed, if the Court finds the network blanket licenses to be unreasonably competitive restraints, it is possible that the form of relief ultimately granted might require modification of the consent decrees. That prospect, however, should not deter the Court from making an independent determination of the legal issues before it.

The decree permits ASCAP and licensees to negotiate any fee and any form of blanket license on which they can agree. It provides, however, that ASCAP must offer at least a "per program" blanket license, 3/ the fee for which would be based on income received for programs in which ASCAP music is played (Para. VII(B)). The fees sought by ASCAP must offer a "genuine economic choice" between per program and other licenses, and ASCAP is restrained from "requiring or influencing the prospective licensee to negotiate for any other type of blanket license prior to negotiating for a per program license" (Para. VII (B)(3),(C)).

On receipt of an application for a license, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on a mutually acceptable fee within 60 days of the filing of the application, the applicant "may forthwith apply to [the District Court for the Southern District of New York] for the determination of a reasonable fee * * *" (Para. IX(A)). In such a proceeding ASCAP has the burden of establishing that the fee it seeks to charge is reasonable (id.).

A consent decree entered in United States v. Broadcast Music, Inc., 1966 CCH Trade Cas. ¶ 71,941 (S.D.N.Y. 1966) is similar to the ASCAP decree in requiring BMI to offer alternative forms of fee systems for blanket licenses (Para. VIII(B).

3/ A "per program" blanket license enables the licensee to use any or all compositions in the repertory, as often as desired, for specified programs of the licensee.

While other provisions of the decree differ from those in the ASCAP decree, 4/ the parties stipulated that CBS could license directly from BMI affiliates with the same ease or difficulty as from ASCAP members. 400 F. Supp. at 751.

Since 1946 CBS and the other television networks continuously have taken blanket licenses from ASCAP and BMI. The fees under these licenses have been based on a percentage of the networks' total revenues or a flat fee and do not depend on the amount or distribution of music use. Until this suit was filed in December 1969, CBS never had sought any other form of license from ASCAP, BMI, or their members. Id. at 743, 752-753.

These Proceedings

CBS, one of the three national television networks, brought this action to challenge the method by which ASCAP, BMI, and their members and affiliates license the nondramatic performing rights to their copyrighted musical repertories. Id. at 741. CBS charged that the blanket license not keyed to specific songs actually used is unlawful because it "compels" CBS to pay royalties that are not based on actual music use. Id. at 745. It argued that the pooling of licensing rights and the issuance of a blanket license

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4/ The BMI decree, for example, does not provide for the district court to set a "reasonable" fee at a user's request. Nor does it expressly reserve to affiliates the right to license their works directly. Only where a user is making a "direct" performance is individual negotiation reserved (Para. IV(A)). In view of the basic similarities of the two organizations, however, we will hereafter refer only to ASCAP with the understanding that, except as may be noted, our comments apply equally to BMI.

constituted price fixing, unlawful tying, a concerted refusal to deal, and monopolization prohibited by Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2, and that these practices also constitute copyright misuse.

The district court severed liability issues from other issues in the case and, after a trial without a jury, dismissed the complaint. After holding that none of the challenged conduct constituted a per se violation of the antitrust laws, the district court viewed the dispositive question under both antitrust rule of reason analysis and copyright misuse law as one of compulsion -- whether CBS is coerced into taking a blanket license. Id. at 747-748, 751.

The court apparently accepted CBS's contention that writers and publishers might be "disinclined" to leave the current blanket licensing system and that users like CBS might be unwilling to risk giving up their blanket licenses in order to pursue direct licensing alternatives. Nonetheless, the court believed that the issue was not what CBS or copyright owners perceived their risks to be, but whether in fact this disinclination by copyright owners to leave the comfort of the current system would actually ripen into a refusal to deal directly when faced with requests by CBS to do so. Id. at 768. The court found that it would not, and that CBS thus had failed its burden of proof.

This Court affirmed the dismissal of all antitrust claims save one. CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977). A majority of the panel held that "the ASCAP blanket license in its present form is price-fixing," a per se violation of Section 1 of the Sherman Act. Id. at 140. It recognized what it termed a limited "market necessity defense" to the per se rule, but found that, since licensing by direct negotiation was feasible, the blanket license is not "necessary" to the functioning of the market.

While this Court accepted as "not clearly erroneous" the district court's findings that a direct licensing market can exist and that CBS had not proved that there are barriers to direct licensing (id. at 141 n.29), it nonetheless found that the very existence of the blanket license dulls the owners' incentives to compete. Id. at 139. It concluded that "[o]ur objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." Id. at 140. In remanding the case to the district court to fashion a remedy, however, the Court suggested that "the blanket license need not be prohibited in all circumstances," since the record did not "compel a finding that the blanket license does not serve a market need for those who . . . deem [it] desirable". Ibid.

The Supreme Court reversed (Broadcast Music, Inc. v. CBS, 99 S. Ct. 1551 (1979)), concluding that the current blanket license is not a per se violation of the Sherman Act, but, rather, should be subjected to a more discriminating examination of competitive effects under the rule of reason. The Court

noted that application of a "per se" label would condemn the challenged license outright. Moreover, contrary to this Court's belief, it stated that a practice per se unlawful could not be saved in some applications or for some users. Id. at 1560-1561 & n.27. The Court reasoned that the blanket license is not a 'naked restraint[] of trade with no purpose except stifling competition' . . . but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use." Id. at 1562. Nor is the blanket license a simple horizontal price fixing arrangement because, while "ASCAP does set the price for its blanket license . . . that license is quite different from anything any individual owner could offer. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets." Id. at 1564.

While a majority of the Supreme Court voted to remand the case to this Court for a full rule of reason analysis, Mr. Justice Stevens, dissenting, believed that the record established that the "exclusive all-or-nothing blanket license policy violates the rule of reason". Id. at 1566.

INTRODUCTION TO ARGUMENT

The legality of the conduct challenged here must be determined under an antitrust rule of reason analysis. The application of the rule of reason requires a careful assessment of the competitive effects of the conduct in question. Deviations from a competitive

industry, if any, must be identified. If anticompetitive industry characteristics exist they must be balanced against any procompetitive aspects resulting from the challenged conduct which are not attainable by less anticompetitive means. The outcome of such an analysis obviously is dependent on the facts of the case.

In this brief, we will discuss the factors which we believe are important in assessing the lawfulness of the blanket license under the rule of reason. Since we were not party to the trial proceedings, we have not presumed to review the lengthy trial record with a view toward determining whether the district court's findings satisfy the "clearly erroneous" test. Rather, our analysis of this case is based solely on the prior opinions of the district court, this Court, and the Supreme Court. That analysis indicates, however, for the reasons explained below, that the district court did not consider all of the factors which are relevant in assessing the lawfulness of the blanket license. This apparent failure by the district court to examine all of the relevant factors may reflect a failure of proof by CBS which is fatal to its rule of reason argument. 5/ On the other hand, there may be ample evidence in the record concerning these factors which simply is not reflected in the district court's findings. If ample

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5/ Similarly, if plaintiff demonstrated anticompetitive effects under the blanket license, defendants should lose if they have failed to introduce sufficient evidence to justify their collective practices. On this point, however, one caveat is in order. If the Court should find that any deficiency in defendants' evidence may be attributable to plaintiff's failure clearly to articulate the proper issues under a rule of reason analysis, defendants should not be deprived of the opportunity to adduce evidence relevant to the broadened issues. For example, if plaintiff's case was tried solely in terms of "compulsion" (see, e.g., 400 F. Supp. at 745), defendants may have quite reasonably limited their case to that issue.

evidence concerning these factors was presented to the district court, then this Court should either remand the case to the district court for further findings of fact or, if the evidence is sufficiently clear, make the necessary findings itself.

ARGUMENT

I. ADDITIONAL FINDINGS ARE REQUIRED BEFORE THIS COURT CAN DETERMINE WHETHER THE CURRENT FORM OF BLANKET LICENSE OFFERED TO THE TELEVISION NETWORKS IS AN UNREASONABLE RESTRAINT OF TRADE

A. The Analysis Required by the Rule of Reason

Although the Sherman Act, read literally, prohibits all multi-party restraints of trade, the Supreme Court has held that it precludes only agreements that are "unreasonably restrictive of competitive conditions." Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1911); National Society of Professional Engineers v. United States, 435 U.S. 679, 690 (1978). There are two complementary analytical methodologies for determining whether an agreement constitutes an unreasonable restraint on competition. "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal per se.'" National Society of Professional Engineers, supra, 435 U.S. at 691-692. One activity which falls into this first category of analysis is price-fixing. Id. In the second categoy are "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." Ibid.

This remand follows the Supreme Court's determination that the licensing activities challenged here fall into the second category of antitrust analysis. Thus "price-fixing," which "is a short-hand way of describing certain categories of business behavior to which the per se rule has been held applicable" (99 S. Ct. at 1557), is no longer an issue in this case. 6/

Under the rule of reason, the ultimate inquiry is whether a challenged combination is one that promotes competition or suppresses it. National Society of Professional Engineers, supra, 435 U.S. at 691. In a joint arrangement which involves the cooperative combination of actual or potential competitors, there is a risk that competition may be unnecessarily reduced. Such a combination, however, may generate substantial efficiencies unobtainable by other means. The Professional Engineers test to determine whether the arrangement is lawful is fairly straight forward. It requires a court to measure only the competitive effects attributable to an arrangement, and to determine on balance whether the net effect is to restrain competition.

6/ Therefore, with due deference, we question the statement in this Court's order of July 6, 1979, that "the Supreme Court did not rule that price-fixing was not involved." We believe this is precisely what the Supreme Court did rule. 99 S. Ct. at 1557. That ruling does not, of course, preclude a finding, under a rule of reason analysis, that the practices at issue have had an adverse effect on price competition. But that is different from price-fixing, whose per se illegality precludes inquiry as to actual competitive effects. Here, by contrast, any anticompetitive effect on pricing must be weighed against any benefits of the collective activity to determine whether, on balance, the effects are anticompetitive; if they are, the activity is unlawful.

To assess the competitive effects of the challenged activity the court should ask the following questions: Was the agreement entered into for the illegitimate purpose of limiting competition? If so, an elaborate inquiry into the actual effects of the conduct may be dispensed with for the parties themselves are presumed to have an accurate impression of the likely competitive effects of their actions on the market in which they operate. L. Sullivan, Handbook of the Law of Antitrust §71 (1977); See Chicago Board of Trade v. U. S., supra, 246 U.S. at 238; see also United States v. United States Gypsum Co., 438 U.S. 422, nn.13, 21 (1978). Even if the purpose of the conduct was legitimate -- to promote trade -- the conduct is unlawful if it has the effect of unreasonably restraining trade. Moreover, conduct which initially had a net procompetitive effect may become illegal if the nature of the market or industry has changed so that the original justification no longer fully pertains. Pertinent to ascertaining the net competitive effect of the conduct at issue are the characteristics of the market in which the challenged activity operates - does the activity in fact promote competition or produce efficiencies; does it produce incentives or disincentives for competitive behavior; do defendants have sufficient market power to enable them to set a supra-competitive price or unreasonably onerous terms? See, e.g., Standard Oil Co. v. U.S., supra, 221 U.S. at 58; Chicago Board of Trade, supra; 246 U.S. at 238; White Motor Co. v. U.S., 372 U.S. 253 (1963); Citizen Publishing Co. v. U.S., 394 U.S. 131, 135 (1969); National Society of Professional Engineers, supra, 435 U.S. at 690 & n.15; R. Bork, The Antitrust Paradox 263-279 (1978); L. Sullivan, supra, §104.

If the court concludes that no anticompetitive effects stem from the concerted conduct, there is no need for further inquiry; the conduct is lawful. If the court concludes that the joint activity produces anticompetitive effects and no procompetitive benefits, the conduct is unlawful. But where the practices adopted by the participants to carry out a joint undertaking produce both competitive restraints and benefits the rule of reason analysis must be taken a step further. The court must determine whether the anticompetitive effects outweigh any procompetitive results. If the challenged practices are necessary to produce the resulting procompetitive benefits then all such benefits would be weighed against any anticompetitive effects which are either inherent in the combination itself or result from the practices being challenged. The competitive effects of a joint activity, however, are severable. If a particular practice is not necessary to obtain certain procompetitive effects resulting from the combination, then those procompetitive benefits may not be weighed against the anticompetitive effects of the particular practice. Only those benefits attributable to the challenged practice may be weighed in the balance. See United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 282-283 (6th Cir. 1898), aff'd 175 U.S. 211 (1899); United States v. Sealy, Inc., 388 U.S. 350, 356 & n.3 (1967); Citizen Publishing Co., 280 F. Supp. 978, 992 (D. Ariz. 1968), aff'd 394 U.S. 131 (1969); L. Sullivan, supra at 208-209.

Whether a practice reasonably is necessary to secure procompetitive benefits depends on the availability of less restrictive alternatives. Berkey Photo, Inc. v. Eastman Kodak Co., 1979-1 Trade Cas. ¶62,718 at 78,027 (2d Cir. 1979). When a less restrictive alternative is available, the use of a more restrictive practice cannot be deemed necessary to achieve the procompetitive benefits. At the time of formation of the joint activity, the parties involved must take reasonable steps to determine whether such less restrictive alternatives are available to achieve procompetitive effects. Moreover, the necessity of a practice should be evaluated throughout the life of the combination, and if it becomes apparent that less restrictive alternatives are available to achieve the benefits, then the more restrictive practice should no longer be deemed "necessary."

B. Application of a Rule of Reason Analysis to this Case in View of the Prior Findings

1. Neither the district court's nor this Court's prior opinion fully answers the questions pertinent to a rule of reason examination of competitive effects. Both courts focused primarily on the alleged anticompetitive effects of the challenged conduct. Neither sought to determine whether those effects were outweighed by procompetitive results relevant to network licensing.

The district court focused its analysis of anticompetitive effects solely on the foreclosure aspects of the blanket license. 7/ While the court acknowledged CBS's arguments that copyright owners who derive benefit from the ASCAP-BMI licensing system might be "disinclined" to deal with CBS in a direct licensing market, and that CBS's perception of the risk entailed in abandoning the current licensing system to attempt direct licensing had kept it locked into the blanket license, the court believed that the crucial issue was not what CBS or copyright owners "perceived" their respective risks to be, but what in fact licensors would do when faced with requests for a direct license. 400 F. Supp. at 766-767. The court found from the testimony of publishers and song writers, and from the nature of the music industry (id. at 770), that "copyright owners would line up at CBS's door if direct dealing were the only avenue to fame and fortune." Id. at 768. It concluded "the CBS has failed to prove that the 'disinclination' of writers and publishers to leave the blanket system would ripen into a refusal to deal directly." Ibid. Believing that as long as a feasible alternative to blanket licensing existed CBS had failed to prove an unlawful restraint, the district court did not attempt to ascertain whether the blanket license contributed to less blatant deviations from a competitive market. Finding no likelihood of an outright refusal to deal, the district court felt no need to conduct a balancing test or consider less restrictive alternatives.

7/ This may be due to the way in which CBS framed its complaint, i.e., in terms of "compulsion." 400 F. Supp. at 745.

This Court, on the other hand, found that a copyright owner disinclination to compete, coupled with what the Court viewed as the price-fixing aspects of the blanket license, warranted per se condemnation. 8/ Although the Court found that the "infringement aspect, unknown elsewhere, except to some extent in the field of patents, makes the music industry sui generis" (562 F. 2d at 132), and that for some business purposes a blanket license might be desirable (id. at 140), the Court's price-fixing characterization and attendant per se analysis made unnecessary: the identification of all the potential anticompetitive effects of and countervailing justifications for blanket licensing; a balancing of the competitive effects; and a search for less restrictive alternatives.

2. We submit that the most accurate manner in which to assess the legality of ASCAP and BMI's blanket licensing practices relating to the television networks is to recognize the undisputed fact that the market reflects substantial deviations from the competitive norm.

8/ This Court stated: "[o]ur objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete." 562 F.2d at 140. It is not clear to us whether the Court viewed the disinclination effect alone -- apart from what it perceived as the price-fixing aspects of the blanket license -- as an unreasonable restraint of trade.

The thousands of music composers and publishers do not offer network users their works at prices subject to individual negotiation. They may compete by other means to obtain network exposure for their individual works but, unlike sellers in a fully competitive industry, they do not seek to obtain exposure by lowering their prices. This deviation from the competitive norm is particularly significant in view of the district court's findings that for many purposes numerous musical compositions are relatively fungible for network use. 400 F. Supp. at 783, also 779. In such circumstances, it would be expected that composers of lesser reputation, or greater financial need at any given moment, would attempt to obtain network plays by engaging in price competition.

Another deviation from a competitive market may be manifested by the fact that, by charging a fee based on a percentage of advertising revenues (400 F. Supp. at 743), ASCAP has been able to obtain more money from the most successful network than from its rivals, despite the fact that success of a network relative to its rivals bears no relation to the amount of ASCAP music actually used under the blanket license. 9/ In view of the relative fungibility of much music for many networks uses, and the fact that the use by one network will not diminish the value of a song to the others, it is difficult to imagine

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9/ The value of the music licensed by ASCAP certainly has no bearing on the relative success of the three networks since they all license the entire ASCAP and BMI repertory.

how even the most successful of composers, on an individual basis, regularly could charge one network more than the others without pricing itself out of at least one third of the network market. Because of the indispensable nature of its collective repertory however, ASCAP knows that the network cannot readily take its business elsewhere, and can engage in price discrimination. Thus the price discrimination engaged in by ASCAP over the years may manifest collective market power exercised by ASCAP. 10/

In addition to the factually undisputed anticompetitive characteristics of the market which have developed while blanket licensing of the networks has taken place, there is the question whether the effect of the blanket license would make CBS's task of engaging in direct licensing more difficult or more costly.

10/ Price discrimination exists when a seller or licensor charges different customers different prices for the same product or different products having the same costs of supply. F. Scherer, Industrial Market Structure and Economic Performance, 253 (1971); L. Sullivan, Handbook of the Law of Antitrust, §29 (1978); II P. Areeda & D. Turner, Antitrust Law §514a (1978). In a competitive market, price discrimination cannot occur for any length of time because other sellers will divert the high profit sales until the differential is eliminated. Sullivan, supra, at 89; Areeda & Turner, supra, at 342. Price discrimination can occur only when three conditions exist: (1) the seller has market power, i.e., some control over price; (2) customers can be segregated into discreet classes with different reservation prices or demand elasticities; and (3) there is an inability of customers paying lower prices to resell to those charged a higher price (a condition which is inherent in a market which deals with a license or a service). R. Bork, The Antitrust Paradox 377 (1978); Scherer, supra, at 253; 256. Thus persistent price discrimination is evidence of a seller's market power. Areeda & Turner, supra, at 342.

The district court's finding that copyright owners would not refuse outright to deal with CBS if CBS abandoned the blanket license (400 F. Supp. at 779) does not by itself preclude a finding that they might make the terms of direct dealing sufficiently onerous to frustrate CBS's efforts in that regard. Moreover, a finding that a feasible alternative to direct licensing exists does not preclude the possibility that ASCAP and BMI might be able to secure supracompetitive prices or impose unreasonably burdensome terms on their licenses in recognition of the economic barriers to direct dealing which the blanket license and its concomitant disinclination effect produce. In reviewing the district court's findings, this Court previously stated that "on this record," taking into account "the strong bargaining power of CBS", it was not convinced that a blanket licensing system overhanging the market would necessarily affect the price of individual licenses. 562 F.2d at 140 n.27. The Court did not address the further question, however, of whether the cost of terminating the blanket license -- with its attendant risks of securing direct licenses at economically feasible terms -- is sufficiently high to enable ASCAP and BMI to take this termination penalty into account in setting fees for its blanket licenses. See Justice Stevens' dissent in Broadcast Music, Inc. v. CBS, supra, 99

S. Ct. at 1565-1567 & n.31. Further analysis of these questions on the basis of the record evidence seems called for. 11/

In any event, we submit that the undisputed evidence of certain noncompetitive market characteristics which have developed in the network licensing business while the blanket license has been in use impose the burden on the defendants to justify its continued use. We hasten to add that the findings of anticompetitive effects do not mandate a finding of illegality under the rule of reason. Rather, they require a showing by defendants 12/ that procompetitive benefits attributable to use of a blanket license for the networks outweigh the anticompetitive effects and that the blanket license is no more restrictive than necessary to achieve the countervailing benefits.

11/ The district court found that ASCAP and BMI have neither the power to set prices nor the power to exclude competition (400 F. Supp. at 783), and that, not only did CBS fail to establish that ASCAP and BMI have the power to control price in a direct licensing market, but that defendants' power "to control the price even of their own blanket or per-program licenses is sharply curtailed under the [consent] decrees." Id. at 783. This discussion of defendants' "power" took place in the context of CBS's Section 2 monopoly claim, however. Since the power to cause price deviations from a competitive norm which signals concern for anticompetitive effects under Section 1 of the Sherman Act is far less substantial than the monopoly power required under Section 2, we do not know what the court's conclusions would have been if it had applied a proper Section 1 analysis to the undisputed fact of price discrimination and the evidence of leverage provided ASCAP by the costs of termination of the blanket license.

And while the district court concluded that CBS could, within a "reasonable" time, drop its blanket license by negotiating direct licenses for pre-packaged programs and securing limited per-program blanket licenses from ASCAP (400 F. Supp. at 765, 779-780), the court did not evaluate whether even minimal barriers to alternative licensing should or could be eliminated by use of a less restrictive form of blanket license.

12/ But see note 5, supra.

3. Identification of procompetitive benefits attributable to the use of a blanket network license may be accomplished only by reviewing the evidence of record, a task which the United States, as amicus, has not presumed to undertake. We offer several observations relevant to the identification of procompetitive effects, however, in an effort to assist the Court.

First, the fact that a blanket license may promote competition with respect to other users of music, e.g. radio or TV stations, is not entitled to be weighed against anticompetitive effects in television networks licensing. 13/ Thus, if television networks do not need a blanket license to obtain adequate indemnification, the fact that radio or TV stations may need such protection because of their spontaneous programming would not justify a competitive restraint on the television networks. 14/ Similarly, if monitoring network

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13/ The district court recognized that through the use of a blanket license ASCAP and BMI are able to generate transaction cost efficiencies not available in the case of individual transactions. Id. 400 F. Supp. at 742. Its opinion, however, does not explore the magnitude of these efficiencies in the context of the television network market.

14/ It has not been argued that the benefits of broad indemnification, monitoring and reduced transaction costs to some users, e.g. radio stations, are dependent on inclusion of the television networks under a blanket license. Moreover, even if such an argument were advanced by ASCAP, it should be rejected for the antitrust laws do not allow sellers to impose competitive restraints on one distinct class of customers in order to benefit a different class of customers. Cf. United States v. Philadelphia National Bank, 374 U.S. 321, 370-371 (1963) (violation of Section 7 of the Clayton Act in local market is not excused by procompetitive effect in larger regional and national markets). Thus, the argument advanced by

[Footnote continued on next page]

use of music is found to be necessary to protect the copyrights of composers and publishers, the Court still must determine whether the necessary monitoring can be done without a blanket license. If it can, the procompetitive benefits of monitoring network use may not be attributed to the blanket license and weighed against the anticompetitive effects of such licenses. See discussion at pages 13-14, supra. 15/

14/ (Footnote continued)

amicus Aaron Copeland, et al (Br. 22-32) that freeing the networks of a blanket license would amount to discriminatory subsidization beyond the province of the judiciary must be rejected. If the television networks have been deprived unreasonably of the benefits of competition by the effects of the blanket licensing system, they should not be required to continue subsidizing other ASCAP customers. The removal of such a competitive restraint, if found, hardly would constitute a usurpation of legislative functions by the judiciary, as amicus Aaron Copeland contends. To the contrary, it is the duty of the judiciary, charged, as it is, by Congress with enforcing the antitrust laws, to remove such competitive restraints.

15/ Finally, it should be noted that all alleged benefits resulting from joint action are not entitled to equal weight in the balance against the joint action's anticompetitive effects. Those benefits that allegedly are necessary to create a market, in this case the monitoring by sellers and broad indemnification for users, are entitled to greater weight than benefits which reflect only cost savings. To countenance a significant restraint of competition for cost savings alone would constitute an improper judicial rejection of the congressional determination that, in the long run, greater competition provides the best means of lowering cost and spurring innovation. This does not mean that if transaction savings are so significant that, without them, a competitive market could not function they should not be considered.

Only after all the competitive effects, positive as well as negative, of blanket licensing to the television networks are explored, may this Court determine whether the licenses unreasonably restrain competition under a rule of reason analysis. If this Court chooses to make these additional findings itself, it should make clear which of the relevant district court findings it is adopting and which, if any, it finds to be clearly erroneous.

II. THIS COURT'S DETERMINATION OF THE LEGALITY OF THE BLANKET LICENSE AS TO THE TELEVISION NETWORK LICENSEES MUST BE MADE ON THE EVIDENTIARY RECORD DEVELOPED IN THIS CASE AND THEREFORE SHOULD NOT BE EXTENDED TO OTHER USERS

Whether or not this Court finds that the current form of blanket license is unlawful as to CBS and the television networks, we believe that the blanket license should not be enjoined in this case as to other users.

Although CBS owns radio stations as well as its television network (400 F. Supp. at 742), it brought this suit solely as a television network licensee. 400 F. Supp. at 741. The evidence focused on the purpose and effect of the current blanket licensing system as it benefited or harmed CBS as a TV network user of copyrighted music. The competitive effects of the challenged licenses may be quite different in that context than with respect to other classes of users. For example, even if much of CBS's music needs for pre-recorded programs can be planned well ahead, and undetected infringement does not pose a significant problem in television performances, the same may not be true for other music uses. The district court expressly noted that conditions prevailing

in the market for performance rights to music used on CBS were very different from circumstances involved in the so-called "3M Incident" where infringement could not be detected or controlled. 16/ 400 F. Supp. at 773-774. This Court, too, noted in its prior opinion, notwithstanding its finding that the blanket license was a per se violation of Section 1, that "[t]here is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable." 562 F.2d at 140.

The Supreme Court similarly noted that "the necessity for and advantages of a blanket license for [radio and television network] users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public." 99 S. Ct. at 1563. 17/

16/ See e.g., 400 F. Supp. at 780; See also 562 F.2d at 140 n.27.

17/ Conversely, licensees who do not have the "stong bargaining power" of CBS and who might wish to get out from under the blanket license, but cannot, might be able to prove an unlawful restraint where CBS could not.

This record does not purport to address the needs or interests of users other than the TV networks. Consequently, this Court should not extend any holding here to other classes of users. 18/

III. A DETERMINATION THAT THE BLANKET LICENSE IN ITS CURRENT FORM IS UNLAWFUL WOULD NOT NECESSARILY PRECLUDE ASCAP FROM OFFERING LICENSES TO INDIVIDUAL COMPOSITIONS BASED ON PRICES DETERMINED INDEPENDENTLY BY COPYRIGHT OWNERS.

If this Court rules that the current television network blanket license is unlawful, we believe ASCAP and BMI could function as agents for their members and affiliates by offering licenses to individual compositions in their repertories, if users and copyright owners agree, at prices independently determined by individual copyright owners. Indeed, the consent

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18/ Indeed, a finding against plaintiff here should not be binding on the other television networks who are not parties to this suit and have had no opportunity to control this litigation or present evidence. 1B Moore's Federal Practice ¶0.411[1], [6]; Divine v. Commissioner, 500 F.2d 1041, 1045 (2d Cir. 1974)(citing Section 93 of ALI Restatement of Judgments); Williamson v. Bethlehem Steel Corp., 468 F.2d 1201, 1203-1204 (2d Cir. 1972), cert. denied, 411 U.S. 931 (1973). A decision here must be predicated on the evidence adduced or not presented by CBS under the various legal theories it has advanced in this litigation.

decrees authorize such licensing in addition to the blanket license. 19/ Under such an arrangement, fees for individual

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19/ We distinguish such a license from the "per use" system suggested by CBS in the district court as a "remedy" to the current blanket license issued by defendants. The "per use" system is a blanket license, but the fee for the license would be based on musical compositions actually played, and derived from a price schedule fixed by ASCAP or BMI and covering all compositions in their repertories. See 400 F. Supp. at 747 n.7. If the current form of blanket license is found to be unlawful, a per use system would appear to have many of the same deficiencies. An ASCAP or BMI fee schedule would automatically eliminate price competition among individual compositions in their repertories. The schedule would have a direct impact on the price of compositions in a direct licensing market as well, since the product -- a single composition -- is the same.

The "per-use" system which CBS proposed to replace the current system preserves to it the advantages of blanket licensing. In that "per-use" system, immediate access to ASCAP's repertory and broad infringement indemnification would still be available, but CBS would pay only for works actually performed. See 400 F. Supp. at 747 n.7. Thus, CBS appears to want the advantages of a blanket license without wanting to pay any premium for its unique benefits. See BMI v. CBS, supra, 99 S. Ct. at 1556-1557 n.13. If blanket indemnification does benefit users, it is not necessarily unreasonable to set the fee for such service independent of actual usage. For, while a user may not use all the music for all the programs to which it is entitled, it has the option to do so, and that option has value apart from the actual music used. See Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 (1950); Broadcast Music, Inc. v. CBS, supra, 99 S. Ct. 1556 n.13.

We also question CBS's modified "per-use" proposal in the court of appeals (CBS Brief on Appeal, pages 23-24, 46-48). To the extent it asks for ASCAP or court-set rates (CBS Br. 36, 48), it is as inappropriate as the original "per-use" remedy outlined to the district court. While a court-set schedule appropriately might be considered at the remedy stage if it is the only means of correcting the anticompetitive effects of past conduct, neither an ASCAP-devised nor a court-ordered price list would appear to facilitate competitive pricing as well as direct licensing would. These complex matters of relief, however, can be dealt with best on remand if it is determined that a violation has occurred.

compositions, like those negotiated for synchronization rights through the Harry Fox agency (see 400 F. Supp. at 759-760), must be set individually by the copyright owners and not collectively by ASCAP or BMI. Of course, if ASCAP or BMI attempted to use individual licensing as a mask for collusive pricing among copyright owners or as a means of denying access to the benefits of its joint venture to some composers while favoring others, serious antitrust questions would be raised.

CONCLUSION

For the foregoing reasons this Court must make additional findings, or remand the case to the district court for pertinent findings, before a determination as to the lawfulness of the current blanket licensing system can be made under the rule of reason analysis mandated by the Supreme Court.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Andrea Limmer, hereby certify that on this 5th day of November, 1979, I caused copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE to be served by United States first class mail, postage prepaid, on the following:

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